Asplundh Tree Expert Co. and David L. Hitt. Case 25-CA-14844

22 March 1984

DECISION AND ORDER

By Chairman Dotson and Members Zimmerman and Dennis

On 23 March 1983 Administrative Law Judge Bernard Ries issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ Both the General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We agree with the judge that Charging Party Hitt quit and was not discharged. Chairman Dotson and Member Dennis consequently find it unnecessary to decide whether Hitt engaged in any concerted activity as defined in *Meyers Industries*, 268 NLRB No. 73 (Jan. 6, 1984). Chairman Dotson also finds it unnecessary to decide whether such activity was protected. Member Zimmerman adheres to his dissenting position in *Meyers* but agrees with his colleagues that it is unnecessary to address the concerted activity issue in the circumstances of this case.

DECISION

BERNARD RIES, Administrative Law Judge. This case was tried in Evansville, Indiana, on January 7, 1983. In issue is whether the Respondent discharged David L. Hitt on June 16, 1982, in violation of Section 8(a)(1) of the National Labor Relations Act.

Briefs have been received from the parties. In reaching the following findings and conclusions, I have relied on a review of the transcript of proceedings, on my recollection of the demeanor of the witnesses as they testified, and on my study of the briefs. For the reasons discussed below, I conclude that the Respondent did not violate the Act as alleged.

The Respondent is a national business concern which provides tree trimming services for the clearance of utility lines and related functions. David L. Hitt began working for the Respondent as a tree trimmer in September

1980, operating out of Vincenes, Indiana. In June 1982, following a storm in the area of Evansville, Hitt and the two other members of his crew, Foreman Richard Brames and tree trimmer Keith Deener, came to Evansville, with some other crews, to repair storm damage. After being there for several days, Hitt's employment terminated on June 16. The case presents two questions: (1) was Hitt engaging in protected concerted activity within the meaning of Section 7 of the Act¹ on June 16; and (2) was he discharged on June 16; and (3) was he discharged as a consequence of that activity, or did he resign from his employment.

On June 16, Hitt's crewmember, Keith Deener, climbed a tree and received two shocks from a power-line which had not been completely turned off. When Deener came down from the tree, he indicated to Hitt that the shock was not a trivial one: his legs felt numb and his hands were shaking. Robert Garrison, an employee of Southern Indiana Gas and Electric Company (SIGECO) who was accompanying the trimming crew, rechecked the line and discovered the cause of the shock to Deener, and then Foreman Brames finished up the work left undone by Deener. The four men then drove in two vehicles to the site of other damage, with Deener telling Hitt on the way that he did not feel well and wanted to go to a hospital.

The events which occurred after the arrival of Hitt, Deener, Brames, and Garrison at the second worksite are in dispute. That there might be some conflict about the sequence and nature of particular words and actions is not very surprising. The conversations under scrutiny here were quite brief and somewhat emotional; some of the individuals involved were slightly dazed at the time from having worked 14-hour days; and more than 6 months had elapsed between these occurrences and their retelling.

No such factors, however, can explain the dreadful performance put on by Hitt at this hearing. His testimony was a morbidly fascinating farrago of self-contradictions and inconsistencies, made all the worse by his inept efforts to explain away the discrepancies. It is, indeed, remarkable that anyone could so obfuscate a rather simple series of events. There may be a vein of truth in this mountain of deception, but I do not know how to mine it. Accordingly, I shall ignore Hitt's testimony except insofar as portions thereof are conceded by the Respondent's witnesses or are otherwise corroborated by Deener.²

While not always articulated with perfect consistency, the General Counsel's essential theory seems to be that when, as seen below, Hitt insisted that Deener be taken to the hospital, he thereby engaged in protected concert-

 [&]quot;Employees shall have the right to . . . engage in other concerted activities for the purpose of . . . other mutual aid or protection"
 Except in a few significant respects, having to do with whether Hitt

^a Except in a few significant respects, having to do with whether Hitt picked up his hat after dashing it to the ground, whether Foreman P'Pool spoke of Hitt remaining silent if he "valued his job," and whether P'Pool went to speak to Garrision during the conversation, the thrust of Hitt's testimony was, now and then, consistent with the facts as found below. Counsel for the General Counsel errs in stating, however, that "All other facts by Hitt [except one postdischarge occurrence] were corroborated by one or more witnesses."

ed activity, and that he was then discharged for persisting in the demand, conduct which purportedly also constituted protected activity.

The testimony shows that when the second worksite was reached, Deener (and perhaps Hitt) told Foreman Brames that Deener should be checked out at a hospital. Brames decided to call in for consultation his immediate superior, General Foreman Frank P'Pool, who was in the vicinity. When P'Pool arrived, he first spoke to Brames and Deener; Hitt walked up to the three after a few moments. Quite probably, the first exchange in the conversation consisted of Brames telling P'Poole that Deener had apparently received an electric shock and wanted to go to the hospital, and P'Pool asking to see Deener's hand and inquiring of Deener as to how bad a shock it had been.3 I think that during this initial phase, Deener also told P'Pool that he thought he should go to a hospital, after which Hitt came over and loudly and impatiently told P'Pool that Deener should be taken to a hospital.4 Irritated by this intrusion, P'Pool told Hitt that he and Brames were in charge and would decide "where to take Deener and when to take him." It seems probable that, at this point, P'Pool told Hitt to go and sit in the

Robert Garrison, the SIGECO employee who was accompanying Brames' crew, appeared at the hearing as a witness for the Respondent; he was alone among the witnesses in testifying that after P'Pool made the foregoing statements to Hitt, the latter said to Brames, "You said that any time a man gets an electrical shock, he should to go the hospital." At that point, Hitt angrily took off his hardhat and slammed it on the ground. The record is in serious conflict as to what happened thereafter.

According to Garrison, as he threw down his hat, Hitt said, "If that's the way you feel, I'm leaving." Garrison's recollection that Hitt said something to the foregoing effect had to be jarred out of him by counsel for the Respondent, and it has no counterpart in the testimony given by P'Pool, Brames, or any other witness. I cannot accept Garrison's testimony. It seems unlikely to me that both P'Pool and Brames would forget such a statement by Hitt. Furthermore, although Garrison was generally a most impressive witness, and I regret having to question his veracity, it did appear to me that he was being inventive on this point.⁵

According to both Deener and Hitt, the next thing that happened after Hitt threw down his hat and that P'Pool said to him, "Pick up your hard hat or hit the road." P'Pool and Garrison were asked whether P'Pool had at any time told Hitt to "hit the road," and they both denied that P'Pool had given such an order. Brames, however, after being examined about the statement given by him to the Indiana Occupational Safety and Health Administration, with which agency Hitt at

one point had filed a complaint, grudgingly testified that P'Pool had instructed Hitt to "pick the hard hat up, get in the truck or hit the road." While Brames thereafter equivocated about this, and Garrison testified that P'Pool "definitely" did not say "hit the road," I am inclined to think that P'Pool did use those words. Brames did, after all, tell the Indiana agency that P'Pool had uttered the words and, at one point in the hearing, Brames simply and without embellishment said that P'Pool had made the statement. No amount of subsequent "might have been saids" and "could have saids" can diminish the impact of such evidence.

Hitt did not pick up the hardhat, as ordered by P'Pool; instead, he walked to the truck, removed some personal belongings, and started to walk away. At this point, P'Pool said something which indicated that Hitt had not yet in fact lost his job; how he said it, and to whom, is in conflict.

P'Pool testified that, as Hitt was moving away, he stated that if Hitt "left the job, he no longer had a job with us." Garrison gave similar testimony (P'Pool said, "If you keep walking, you won't work here anymore") and, at several points, so did Brames ("If you leave now, you ain't going to work with us again"). Deener agreed that P'Pool said something to this effect, with the material difference that Deener had P'Pool addressing the remark to Brames, not to Hitt ("He told Mr. Brames if [Hitt] left—if he went home, he was not to come back on the job"). Deener further guessed that Hitt was some 40 feet from P'Pool when this statement was made, and he said that he did not think that Hitt could have heard the utterance.

I am inclined to believe that the version given by Deener is the correct one. Although Brames, in his first appearance at the trial as an adverse witness called by the General Cousel, four times testified in a manner consistent with the account attributed to him above, his testimony changed when he was later called as a witness by the Respondent. At that time, in going over the incident, he testified in passing, "That's when Frank said, 'If he leaves now, he's not to return again to work with us." My instinctive feeling is that the last version is the correct one.

In sum, I find the sequence of events to have occurred approximately as follows. After P'Pool arrived at the worksite, Deener told him that he wanted to be checked over at a hospital. P'Pool began inquiring into the extent of the injury and Hitt impatiently demanded that Deener be taken forthwith to a hospital. P'Pool curtly told Hitt to mind his own business and to sit in the truck. Hitt, outraged, reminded P'Pool of the policy that employees who receive shocks are to be placed under medical observation, and angrily threw his hardhat on the ground. P'Pool told him to pick up his hardhat or "hit the road." Hitt walked to the truck, secured some belongings, and went down the road. P'Pool told Brames that if Hitt

³ Testimony of Deener and P'Pool.

⁴ Such a demand was consistent with company policy; as explained by P'Pool, "Any electrical shock, I have told my foreman to—any shock, anything, to be sure to get it checked out."

⁸ Garrison was an apparent neutral in this matter, but his testimony indicated some partiality. Thus, he volunteered that P'Pool "definitely" did not say "hit the road" at one juncture, although it seems clear that P'Pool did use those words, as hereafter discussed.

⁶ Hitt testified that he did dutifully pick up the hat, in the face of specific testimony just previously given by Deener that the hardhat "continued to sit on the ground" when Hitt walked away. As noted, I do not credit Hitt in such circumstances.

really walked away, he was through; this instruction may or may not have been heard by Hitt.⁷

Was Hitt discharged for engaging in Section 7 "concerted activities for the purpose of . . . other mutual aid or protection," as proscribed by Section 8(a)(1)?

Although the Respondent says no, I consider it clear that Hitt's demand that Deener be taken to a hospital constituted protected concerted activity. The Respondent argues that such activity was unprotected because "the evidence shows that no other employee share[d] the complaining employee's concern." That is not so; Deener testified that he wanted to be examined and that he was "very mad" at the delay in seeking out treatment. To say, as the Respondent does, that there was no "dispute at all in which [Hitt] could rightfully become involved" is to ignore both the deliberate pace at which P'Pool was considering the problem, as perceived by both Hitt and Deener, and the settled principle that the reasonableness of concerted protest is irrelevant. NLRB v. Washington Aluminum Co., 370 U.S. 9, 16 (1962); NLRB v. Halsey W. Taylor Co., 342 F.2d 406, 408 (6th Cir. 1965).

It seems to me that Hitt's attempt to intercede with P'Pool on behalf of Deener, in the interest of enforcing a policy—medical attention for a shocked employee—which would not only be of immediate value to Deener but would also be of potential benefit to Hitt in a similar situation, was the purest sort of "concerted" activity for the purpose of "mutual aid or protection." See Ethan Allen, Inc. v. NLRB, 513 F.2d 706, 708 (1st Cir. 1976) (conduct "having the welfare of other workers in mind"); Air Surrey Corp., 229 NLRB 1064 (1977) (the employee's actions "clearly encompassed the well being of his fellow employees"), affd. on this point 601 F.2d 256 (6th Cir. 1979).

It is clear from the evidence, however, that Hitt's termination did not flow immediately and directly from his insistence that Deener be given medical treatment. The General Counsel, indeed, contends specifically that the "Respondent discharged the Charging Party because he engaged in the protected activity of throwing his hat and engaging in a strike by walking off the job." 8

It might reasonably be argued, as the General Counsel does, that Hitt's expression of anger in throwing his hat to the ground was itself an extension or manifestation of res gestae of the protected activity. Cases have held that such displays of temper in the course of protected conduct may not, except in extreme circumstances, be singled out as grounds for discipline, since holding otherwise would cabin an employee's right to freely engage in that conduct. Bettcher Mfg. Corp., 76 NLRB 526, 527 (1948); Crown Central Petroleum Corp., 177 NLRB 322 (1969). But I see no reason here for concluding that Hitt was disciplined for throwing the hat.

The fact is that, the hat having been thrown by Hitt, it was thereafter incumbent on him to pick it up and behave himself. P'Pool at that point gave Hitt what would seem to be a reasonable and legitimate set of options: to pick up the hat and go about his duties, or to leave his employment. That choice may perhaps be called one of two things, a conditional discharge ("if you do not pick up the hat, you are fired") or an opportunity to quit ("if you do not pick up the hat, you will have signified that you no longer wish to work upon the terms and conditions of employment afforded by this company"). Whatever the rubric, the ball was properly in Hitt's court and he chose not to play. Given a legitimate choice, one which the Respondent was entitled to impose, Hitt opted to forsake employment. I see no discharge, and no violation of the Act, in that.

It can be said, of course, that had it not been for the earlier, and protected, portion of the sequence, P'Pool would not have put Hitt to this choice. There is, however, no way to test that proposition. For all that the record shows, P'Pool might well have given that same choice to any employee who angrily flung his hat to the ground in P'Pool's presence, regardless of the inciting event. There is no basis for concluding that the protected character of the preceding conduct in this instance made a difference in P'Pool's reaction to the hat being thrown on the ground.

It would appear that after giving Hitt the "pick-up-the-hat-or-hit-the-road" option, P'Pool relented, as evidenced by his statement to Brames that if Hitt really left, he was through. I have no idea whether Hitt heard this or not, but the statement nonetheless indicates a forgiving attitude on P'Pool's part, a willingness to accept Hitt back despite the original demand made by him and despite the hurling of the hat and despite the refusal to pick up the hat. The General Counsel attempts to turn this apparent leniency on P'Pool's part to his own advantage by arguing (at one point, anyway) that this final opportunity afforded by P'Pool establishes that Hitt was not in fact discharged until he finally left the site, and that he was therefore "discharged for engaging in a strike."

It might, on the other hand, be more appropriate to characterize P'Pool's attitude as suggesting, "He is through, but if he returns, I will give him another chance." In any event, even if this limbo in which Hitt existed until he disappeared over the horizon could be considered a form of continuing employment, it is hard to see how its termination can be thought of as a "discharge for engaging in a strike." For even if it were accepted that Hitt's final disappearance triggered a "discharge," it is not easy to conclude that the "discharge" was provoked by Hitt's "engaging in a strike."

For one thing, Hitt's own view, as expressed in the detailed charge filed by him, was that he had been "fired" before he left the site; if that was so, he would not have entertained the notion that, by walking away, he was engaging in a strike, i.e., an intentional withholding of labor by a current employee. For another, and pointing

⁷ After Hitt left, Deener was taken to the hospital by P'Pool, and he returned to work that same day.

asserts that "the Charging Party was discharged when he threw his hat to the ground" and also that "the record clearly reveals that he walked off the job after being fired." If these latter assertions were correct, they would render superfluous the second part of the earlier formulation that the Respondent discharged Hitt for throwing his hat "and engaging in a strike by walking off the job."

At one point in his testimony, Hitt said that after he threw his hat down, he was walking toward the truck with the intention of getting Continued

to a similar conclusion, there is the testimony of William Tuley, a superintendent for SIGECO, who testified that Hitt called him shortly after his termination to say that he "had quit the job and wanted to know how to get his money." Tuley was a credible witness. To the extent that it may be inferred from this that Hitt had knowingly relinquished his job instead of being discharged from it, it of course follows that there could have been no concomitant intention to strike. 10

Most importantly, there is the problem of whether P'Pool reasonably would have understood the departure of Hitt as a "strike." The law is clear that one requirement of a case such as this is proof that the employer was aware of the protected nature of the activity when he discharged the employee. E.g., Air Surrey Corp. v. NLRB, supra, 601 F.2d at 257. When an employee angrily walks off the job, as Hitt did here, divining his purpose is not so easy for the employer: is the employee striking (withholding labor) or is he quitting? While a mass departure might more readily connote a strike, a walkout by a single employee seems more ambiguous. Obviously, his leaving could be one thing or the other; the fact here that Hitt stopped at the truck to pick up his personal possessions perhaps suggests a quit, not a strike. Moreover, and more meaningfully, since Hitt purposefully strode off in seeming response to P'Pool's clear order to pick up the hat or leave, it might reasonably have seemed to P'Pool that Hitt was simply choosing not to comply with a lawful order but was, rather, electing to give up his job.

The foregoing considerations lead me to conclude that there was no reason for P'Pool to believe on June 16, or any time thereafter, that Hitt was engaging in a strike when he strode off on June 16.11

Furthermore, for the reasons given above, I conclude that the Respondent did not violate the Act as alleged in the complaint.

CONCLUSIONS OF LAW

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The evidence does not establish by a preponderance thereof that the Respondent has violated the Act as alleged in the complaint.

On the basis of the foregoing findings of fact and conclusions of law, I recommend the following 12

ORDER

The complaint herein is dismissed in its entirety.

[&]quot;some equipment ready to do the next job" when P'Pool told him to "hit the road," which he did.

¹⁰ The General Counsel argues, with some force, that Hitt might have referred to "quit" rather than "discharge" in speaking to Tuley for various tactical reasons without really intending to commit himself to the characterization. That could well be so.

¹¹ The Board has held that, when a single employee walks off in apparent continuation of a concerted protest, that action is "protected because it involve[s] a group concern," Ontario Knife Co., 247 NLRB 1288, 1289 (1980). On review, the Court of Appeals for the Second Circuit diasgreed, holding that the walkout was not an extension of or automatically covered by the mantle of the prior concerted activity, and that there was nothing to show that the other employee previously involved in the protest agreed with or approved of the walkout: "While Cobado was doubtless speaking for Swift in the initial protest . . . she was not doing so in the act that led to her discharge." 637 F.2d 840, 845-846. The facts of that case make the Board's holding inapposite to this case; there the employee was expressly "discharged for breaking Respondent's rule concerning leaving the plant without permission," 247 NLRB at 1288.

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.